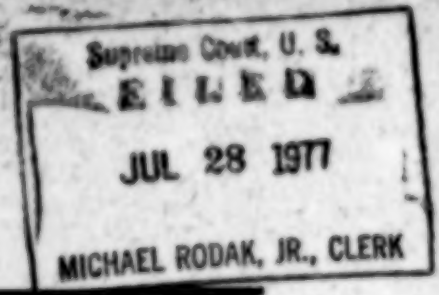


No. 76-1505



In the Supreme Court of the United States

OCTOBER TERM, 1977

MARSHALL P. SAFIR, PETITIONER

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-17a) is reported at 551 F. 2d 447. The order of the district court (Pet. App. D, p. 55a) is unreported.

JURISDICTION

The judgment of the court of appeals (No. 77-65, Pet. App.) was entered on February 11, 1977. The petition for a writ of certiorari was filed on April 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Commerce is required to recoup all subsidies paid to shipping lines during the period they were in violation of Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227.

(1)

STATUTORY PROVISION INVOLVED

Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

1. Petitioner was the owner of 50 percent of the stock of Sapphire Steamship Lines, Inc., which began operations as a common carrier by water in March 1965. Sapphire Lines offered rates that undercut those of competitor shipping lines, all of whom were members of a conference known as the Atlantic and Gulf American Flag Berth Operators ("AGAFBO"), and many of whom, unlike Sapphire Lines, received operating-differential subsidies from the Secretary of Commerce under Section 601(a)(4) of the Merchant Marine Act of 1936, 49 Stat. 2001, as amended, 46 U.S.C. 1171(a)(4). In response, AGAFBO reduced its rates for the carriage of cargo on those routes where its members competed with Sapphire Lines. Sapphire Lines lost business thereafter and was adjudged a bankrupt in May 1967.

The Federal Maritime Commission conducted an investigation of AGAFBO's action, as well as other "practices surrounding the procurement of * * * cargoes," and found that "AGAFBO's rates were contrary to the public interest because they were predatory in nature * * *" (11 FMC 263, 264, 283). The Commission concluded that the AGAFBO rate structure violated Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814. 11 FMC at 287.¹

After the Commission's ruling, petitioner and Sapphire Lines, through its trustee in bankruptcy, brought suit in the United States District Court for the Eastern District of New York, asserting that Section 810 of the Merchant Marine

¹The Justice Department thereafter sought civil penalties from the offending lines under the Shipping Act. See Investigation of Alleged Section 810 Violation, 12 Shipping Regulation Reports 1105, 1108-1109 (December 1972).

Act of 1936, 46 U.S.C. 1227, which prohibits the payment of subsidies to lines engaged in unfair practices, required the Secretary, acting through the Maritime Subsidy Board,² to stop paying subsidies to all AGAFBO lines and to recover all subsidies paid to those lines in the past. The district court dismissed the suit. *Safir v. Gulick*, 297 F. Supp. 630 (E.D. N.Y.).

The Second Circuit reversed, ruling that the Board "was at least required to make a considered decision whether to recover the subsidies paid in the past." *Safir v. Gibson*, 417 F. 2d 972, 978 (*Safir I*); Pet. App. W, pp. 221a, 231a. The court remanded the case so that the Board could "give clear indication that it has properly exercised the discretion with which Congress has endowed it." *Ibid*.

On remand the Board commenced an administrative proceeding to determine whether Section 810 had been violated by the AGAFBO carriers and, if so, whether subsidies should be recouped (MSB Docket S-243). The proceeding was suspended when Sapphire Lines moved in the district court for an order enjoining the Board from making further subsidy payments to the AGAFBO lines. The district court denied the motion.

The court of appeals affirmed the denial of the injunction but held that the Federal Maritime Commission's determination that the AGAFBO carriers had violated Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, also conclusively determined, for the purposes of the Maritime

²The Secretary has delegated responsibilities relating to the award, amendment, and termination of subsidy contracts to the Maritime Administration and Maritime Subsidy Board. Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840.

Subsidy Board proceeding, that the AGAFBO carriers had violated Section 810 of the Merchant Marine Act. *Safir v. Gibson*, 432 F. 2d 137 (C.A. 2) (*Safir II*), certiorari denied, 400 U.S. 850; Pet. App. V, pp. 209a-220a. The court explained, however, that it was not requiring the Board to recoup all subsidies (432 F. 2d at 145 n. 2; Pet. App. V, p. 220a n. 2):

Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

See also Pet. App. S, p. 204a (opinion on denial of rehearing).

2. The Board thereafter resumed proceedings and in April 1973 determined that \$2.4 million should be recovered from those AGAFBO lines in direct competition with Sapphire Lines (the "trade lines") (Pet. App. N, pp. 104a-176a).³ This amount, while substantially less than the amount paid out in subsidies during the time those lines were found to have violated Section 810 of the Act, was based upon the nature and extent of each line's participation in the illegal conduct and upon consideration of several mitigating factors (Pet. App. N, p. 127a). The Board determined additionally that it would not impose sanctions on the AGAFBO lines that were not in competition with Sapphire Lines (the "non-trade lines").

³During the course of the proceedings before the Board, *Safir* brought five separate suits seeking either to enjoin continued payment of subsidies to AGAFBO lines or to have interlocutory review of the Board's decision not to recover the entire amount of subsidies paid to the lines during the period of violation. His requests were all denied. The courts' decisions are described at Pet. 12-14.

AGAFBO appealed the Board's decision to the Secretary of Commerce (see 46 C.F.R. 202). The Secretary affirmed the Board's order with respect to the nontrade lines and reduced the amount to be recouped from the trade lines to \$1.1 million (Pet. App. E, pp. 56a-57a).

Respondent Safir then brought this suit for review of the Secretary's decision in the United States District Court for the District of Columbia, asserting, *inter alia*, that the Secretary has an inflexible, non-discretionary duty under Section 810 to recover all subsidies paid to all AGAFBO steamship lines during the period of violation. On cross motions for summary judgment the district court dismissed the complaint (Pet. App. D, p. 55a).

The court of appeals, noting that the Second Circuit in *Safir II* had "rejected" petitioner's "extreme position" (Pet. App. A, p. 12a), affirmed the district court's ruling that the Secretary is not under a mandatory duty to recoup all subsidies paid during the period AGAFBO was in violation of Section 810. The court reversed the dismissal of the complaint, however, and remanded for further proceedings to consider, *inter alia*, Safir's claim that the decision of the Secretary constituted an abuse of discretion (Pet. App. A, pp. 13a-17a).⁴

ARGUMENT

The question whether the Secretary must recoup all subsidies paid to shipping lines during the period they were in violation of Section 810 does not warrant review by this Court. Petitioner's contention that the Secretary has no discretion whatsoever in this regard is, as the court of

⁴In reversing, the court of appeals held that petitioner has standing to maintain this suit to review the Secretary's action (Pet. App. A, p. 7a). We have challenged that holding in a conditional cross-petition (No. 77-65).

appeals characterized it (Pet. App. A, p. 12a), an "extreme position" that properly was rejected by the Second Circuit in *Safir II* and by the courts below in this case. There is no conflict among the circuits on the question.

The legislative history of the Merchant Marine Act demonstrates that Congress established the subsidy program to aid United States vessels in meeting foreign flag competition. H.R. Doc. No. 118, 74th Cong., 1st Sess. 1 (1935); Hearings on H.R. 7521 before the House Committee on Merchant Marine and Fisheries, 74th Cong., 1st Sess. 833 (1935); see *States Marine International, Inc. v. Peterson*, 518 F. 2d 1070 (C.A. D.C.), certiorari denied *sub nom. American Maritime Association v. Richardson*, 424 U.S. 912. But petitioner's reading of the statute, which in this case would require the Secretary to recover approximately \$200 million in subsidies from the lines (Pet. 29), could reasonably be expected to cripple a major segment of the United States merchant fleet and thus is contrary to the principal legislative purpose of the Act. As the Maritime Subsidy Board stated (Pet. App. N, p. 126a; footnote omitted):

[C]onflicting statutory purposes are presented. On the one hand, the Act requires promotion of the U.S. merchant marine through subsidies and other means, and, on the other hand, Section 810 requires withdrawal of those subsidies when they are used to the detriment of a U.S. operator within our merchant marine. Certainly, Congress intended both purposes of the Act to be carried out. Therefore, it is apparent that Congress intended considerable discretion in weighing the recoveries to be effected for past discontinued violations so as not to infringe seriously upon the promotional purpose of the Act. Further since Section 810 is at least partially penal in

character in requiring retroactive recovery of subsidy for past violations, mitigating circumstances can be considered in determining the sanctions to be imposed.

Section 810 does not by its terms require recoupment of subsidies, and the question therefore is whether the Secretary's and Board's interpretation of their authority under the Act is reasonable. Their judgment in this regard is entitled to considerable weight, for they are "charged with administration of the Act." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87. The "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381; see *Knebel v. Hein*, No. 75-1261, decided January 11, 1977; *Udall v. Tallman*, 380 U.S. 1, 16-18. There are no such indications here.³

³Petitioner seems to suggest that the government, in its brief in opposition to certiorari in *Safir II*, took a different position with respect to the discretionary nature of Section 810 than it does now (Pet. 27). In that brief, however, the government plainly stated that "[i]t is our basic position that the Board has discretion to determine whether and when to invoke Section 810 against particular carriers * * *" (Pet. App. R. p. 198a), and noted that even where the violations are willful, "the Board has discretion to determine whether, in light of the basic policies underlying the Merchant Marine Act, the particular circumstances call for the termination of subsidy" (Pet. App. R. p. 199a).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1977.